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CHARLES ELMORE CRO
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

E. R. MOODY, Owner, Ferry Barge Martha Ruth Moody,
Petitioner,

vs.

LEONARD EDMONSTON, Administrator of the Estates of Charlie W. Vaughn, Charles H. Vaughn, Albert B. Vaughn and Norris H. Vaughn,
Respondent.

No. 793

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

VON MAYES,
L. E. GWINN,
Counsel for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED.

This is a case in admiralty and judgment was rendered by the Judge of the United States District Court at Memphis, March 25, 1949, in favor of respondent administrator, and against petitioner in the following amounts, to-wit:

For the death of Charlie W. Vaughn—$17,500.00; for the death of Charles Henry Vaughn—$7,500.00; for the death

of Alfred Bailey Vaughn—$6,500.00; for the death of Norris Howard Vaughn—$5,000.00, or a total of $36,500.00.

Charlie W. Vaughn was an adult. Charles Henry Vaughn, Alfred Bailey Vaughn and Norris Howard Vaughn were minors, aged nine years, five years, and three years, respectively (R. Vol. I, page 24).

All of them were drowned in an accident on March 19, 1948, at a ferry landing on the east bank of the Obion River in Dyer County, Tennessee, alleged to have been caused by the negligence of petitioner, as owner of the barge or ferry, which had transported them across that river immediately preceding the accident (R. Vol. I, page 24).

On appeal, the judgment of the District Court was affirmed by an Order entered February 16, 1949. No opinion was filed, but the Order recited that the "findings of fact" by the trial court were amply "sustained by the record and its conclusions of law" were correct.

Petition for rehearing was duly filed and denied without opinion March 31, 1950.

Jurisdiction is invoked under Title 28, Section 2101, of the United States Code, effective September 1, 1948, and Rule 38 of this Court. Certified copy of the record, including the proceedings in the United States Court of Appeals for the Sixth Circuit and requisite number of additional copies are filed with the petition.

As shown by the findings of fact, the ferry barge was a modern vessel of steel construction, seventy feet in length, twenty feet in width, weighing approximately forty-two tons, and manned by a crew of four.

On the late afternoon of March 19, 1948, decedent Charles W. Vaughn, his wife, and four minor children were traveling in a 1½-ton Chevrolet truck, driven by said Charlie

W. Vaughn, and were being transported across the River on the barge. There were placed on the barge this truck and three other vehicles, being (1) a passenger automobile, (2) a station wagon and (3) a 1½-ton truck loaded with wooden blocks. The passenger automobile and the station wagon were placed near the front end of the barge; the Vaughn truck and the other truck, referred to in the record as the block truck, were placed near the rear end and approximately side by side, except that the latter was slightly forward from Vaughn's truck (R. Vol. I, p. 26).

The barge was not overloaded; in weight and number, the vehicles thereon, constituted about one-half of its capacity (R. Vol. I, p. 89).

At low stage, the width of the Obion River was about twice the length of the barge. At the time of the accident, it was at a high stage but still confined within its banks, and the distance from the starting point on the west bank to the landing point on the east bank was between 300 and 400 feet (R., Vol. I, p. 15).

The fourth finding of fact by the trial judge reads as follows:

> "**The ferry barge crossed the river without incident and the east end, or front, was fastened by means of chains to the east bank.** Thereupon, crewmen gave signals to the drivers of the automobile and station wagon, placed on the forward end, to drive off, which they did. The driver of the truck loaded with wooden blocks was next signaled to leave the barge. **As the latter (block truck) passed over the front end and off of the barge and steel apron, that end was caused to sink, due to the weight of the loaded vehicle, and then to spring upward as said truck left the barge, with the result that there was set up a rocking, or bobbing, motion in the barge**" (R., Vol. I, p. 26).

The finding of fact includes three separate findings, the first and third being printed in bold type for emphasis.

The recital that the "ferry barge crossed the river without incident and the east end, or front, was fastened by means of chains to the east bank" is supported by undisputed evidence, which also established that the barge had been fastened securely to the east bank, that the steel apron on the front of the barge was let down after it landed and extended onto a platform on the land and that all of this had been completed before Vaughn's truck started backward (R., Vol. II, pp. 11, 78, 93, 130, 131, 183, 203).

The third part of the fourth finding of fact is the basis of the fifth finding, which contains this statement:

> "As a result of the motion of the barge upward, the Vaughn truck began to roll slowly backward. Decedent, Charlie W. Vaughn, who was standing beside the truck, leaped in the cab, but was unable to stop its backward movement. There were no scotches under the wheels and no chain across the rear end of the barge to prevent the truck from rolling into the river."

The above finding as to the cause of the accident is not only inconsistent with the testimony upon which the court predicated the first portion of the fourth finding of fact, but it was also impeached by undisputed evidence of physical facts which established that the passing of the block truck from the barge, under the conditions then existing, could not possibly have "set up a rocking, or bobbing, motion in the barge" (R., Vol. II, pp. 11, 48, 49, 78, 93, 130, 131, 183, 203).

This finding was also impeached by undisputed evidence of physical facts which showed that the Vaughn

truck could not have slowly rolled backward, as stated by the court. According to the testimony of petitioner's witnesses, the Vaughn truck was in reverse gear and backed into the River, not only being in such gear when taken out of the water, but the switch key was also turned on (R., Vol. II, pp. 11, 153, 154, 157, 160). Mrs. Vaughn and another witness testified that it was in second gear (R., Vol. I, pp. 89, 90, 125), but Mrs. Vaughn based her testimony on the fact that her husband usually put the car in second gear when he went on a ferry and the other witness based his testimony upon the position of the handle or gear shift but without an examination of the gears. It was also established by affirmative uncontradicted evidence that the wheels could not roll while the truck was in gear (R., Vol. II, pp. 154, 157, 158).

The testimony also showed that the motor was running when the Vaughn truck started backward (R., Vol. II, pp. 96, 112, 141, 148, 185), Mrs. Vaughn being the only witness, who was on the barge, that testified to the contrary.

As viewed by us, the sole and proximate cause of the accident was the act of Vaughn in putting his car in reverse and backing, instead of moving forward. The chain across the rear of the barge was adequate to have stopped a car in neutral that was rolling backward but not sufficient to withstand the pressure or force of a car in gear, with the motor running (R., Vol. II, p. 185), and as a chain would be broken by the power and force of a car backing in gear, with the motor running, it is not material whether there was a chain across the rear of the barge when the truck backed into the River. However, the overwhelming preponderance of the evidence on that point shows that there was a chain across the rear of the barge adequate for the purpose for which such a chain would be used (R., Vol. II, pp. 12, 72, 73, 90, 91, 92, 125, 130, 132, 134, 136, 159, 184, 185).

There was no evidence as to the pecuniary value of the life of Charles W. Vaughn, whose administrator was awarded a judgment in the amount of $17,500.00 for the death (R. Vol. I, p. 29). He was a victim of dementia praecox and had been twice an inmate of the Western State Hospital for the Insane, at Bolivar, Tennessee. He was a farmer. His wife helped him in his farming operations, making a regular field hand (R. Vol. I, p. 73). No effort was made to show his earning capacity as a farmer except for the year 1947. Attempt was made to establish this by the gross proceeds of the crop produced that year but the amount thus received was not the result of his labor alone. His wife, a hired hand and day laborers assisted in making the crop but the amount paid for labor and other costs of production were neither shown nor attempted to be shown by the evidence (R. Vol. I, pp. 56, 57, 72, 73).

In his findings of fact and conclusions of law, the court did not state or suggest the earning capacity of Vaughn (R. Vol. I, pp. 26, 27, 28, 29).

In stating the measure of damages, the court, in his fifth conclusion of law, said: "In considering and assessing damages in this case, it is also proper to make allowance to a mother for the deprivation of her deceased children's society and companionship" (R. Vol. I, p. 29). About ten days after the conclusions of law were filed, the court, on his own motion, amended Section V thereof so as to strike therefrom the paragraph above-quoted, his order reciting that the part of the finding thus eliminated was not considered in reaching a conclusion as to the amount of damages (R. Vol. I, p. 32).

The eighth finding of fact, among other things, recites that Vaughn was not "guilty of negligence of any kind or character" (R. Vol. I, p. 27). If defects that rendered the barge unseaworthy existed as recited in the sixth find-

ing of fact, proximately contributing to the death of Vaughn, and his position on the barge was as stated in the fifth finding of fact (R. Vol. I, p. 26), then these defects were plainly observable by him and raised a presumption of contributory negligence on his part.

APPLICABLE STATUTE.

So far as material, Section 8236 of Williams' Annotated Code of Tennessee for the year 1934 reads as follows:

> "The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and, in case there is no widow, to his children or to his next of kin; or to his personal representative, for the benefit of his widow or next of kin, in either case free from the claims of creditors."

Under the construction of this statute by the Supreme Court of Tennessee, as will hereafter be shown, direct contributory negligence of the decedent bars a recovery and remote contributory negligence reduces the damages that might otherwise be recovered.

QUESTIONS PRESENTED.

(1) Whether or not the trial court and the Court of Appeals, in the assessment of damages for the death of Vaughn, construed and applied the above statute in accordance with the interpretation thereof by the Supreme Court of Tennessee.

(2) Whether or not the evidence and the findings of fact by the trial court establish either proximate or remote contributory negligence on the part of the decedent Vaughn.

(3) Whether there must be some data from which damages in an action for death may be measured with some degree of certainty or whether such damages may be based upon mere guesswork or speculation as to the pecuniary value of the life of a decedent.

(4) Whether or not the act of Vaughn in putting his car in reverse and backing into the river while the motor was running constituted the proximate cause of the accident in which he lost his life.

(5) Whether or not evidence that is contrary to scientific principles or physical facts is sufficient to support a verdict.

(6) Whether or not a litigant is entitled to have a decision of the points actually presented by the appeal.

Instead of filing a separate brief, we have set out in stating the reasons why the writ of certiorari should be granted the legal questions involved, as conceived by us, with supporting authorities.

II.

REASONS WHY THE WRIT SHOULD BE GRANTED.

1. A litigant is entitled to have a decision of the points actually presented by the appeal and the record. Maryland Casualty Co. v. Jones, 279 U. S. 792, 796; Lonergan v. United States, 303 U. S. 33, 35.

The opinion of the Court of Appeals omits any discussion of either factual or legal questions, but an examination of the unchallenged petition for a rehearing in connection with the record shows that certain points were directed to the attention of the Court of Appeals, namely:

(1) That the finding that decedent's truck "**rolled slowly** backward" into the river, as the result of a rocking or bobbing motion in the barge caused by the passage of another truck from the front end of the barge after it had landed, was contrary to scientific principles and physical facts established by undisputed evidence (R. Vol. II, pp. 11, 48, 49, 78, 93, 130, 131, 183, 203), and (2) that the truck was in gear and therefore could not have "rolled" backward (R. Vol. I, pp. 89, 90, 125; Vol. II, pp. 11, 115, 153, 154, 157, 160).

As conceived by us, respondent's contention and the trial court's finding as to the proximate cause of the accident are based upon inferences or conclusions, and such a case must fail upon proof of undisputed physical facts in conflict with mere conclusions and, in determining this question, the limited scope of observation of a witness who undertakes to state facts or draw conclusions should be considered.[1] Pennsylvania Railroad Co. v. Chamberlain, 288 U. S. 331; Phillips Petroleum Co. v. Manning, 8th Cir., 81 F. 2d 849.

2. If defects in the barge existed as found by the trial judge and these contributed to the accident in which Vaughn lost his life, the defects were plainly observable by him, but there is neither claim nor evidence that Vaughn complained of the defects or requested additional safeguards. He therefore assumed the risk of injury therefrom. On this point we quote from **Talbot v. Taylor**, 184 Tenn. 428, 201 S. W. 2d 1, 3, as follows:

> "* * * Whether the plaintiff be considered as contributing directly to the injury or as having incurred the risk, the result is the same. The underlying principle in either case is embodied in the maxim quoted above, the meaning of which is 'that to which

[1] Respondent's witnesses herein were not in a position to see whether the Vaughn truck was moving in reverse or rolling backward (R. Vol. I, pp. 112, 163, 168, 197, 199)

a person assents is not esteemed in law an injury.' Milliken v. Keddesheimer, 110 Ohio St. 381, 144 N. E. 264, 266, 33 A. L. R. 53. The same thought is embodied in our decisions, to the effect that if one by the exercise of ordinary care and prudence for his own safety might have avoided the injury, he must be regarded as the author of his own misfortune. Whirley v. Whiteman, 38 Tenn. 610; Railroad v. Pugh, 97 Tenn. 624, 37 S. W. 555; Nashville etc. Railway Co. v. Norman, 108 Tenn. 324, 67 S. W. 479; Louisville & N. R. R. Co. v. Anderson, 159 Tenn. 55, 15 S. W. 2d 753.

"As to the question of assumption of risk, this Court, in Lea v. Gentry, 167 Tenn. 664, 670, 73 S. W. 2d 170, 172, said: 'When there can be no dispute as to his consciousness of the peril inherent in such a situation, then a question of law only remains, and the question is one for the court.' "

The principles thus stated apply to accidents governed by the Tennessee statute (Code, Section 8236, supra), and, in its application, direct contributory negligence bars a recovery and remote contributory negligence reduces the damages. Bejach v. Colby, 141 Tenn. 686, 693, 214 S. W. 869.

3. The clear preponderance of the evidence shows that the chain on the rear end of the barge was fastened, but the purpose of that chain was not to resist the pressure of a truck in gear but to prevent a vehicle from slipping or sliding into the river, and the uncontradicted testimony shows that a chain of regulation size and strength would not have stopped the truck moving in reverse under the power of the motor (R. Vol. I, pp. 212, 231; Vol. II, pp. 72, 92, 185).

It appears from affirmative, uncontradicted evidence the Vaughn truck was in gear, and the examination made by

the sheriff, by an automobile mechanic and by several other persons, when it was taken out of the river, establishes to a mathematical certainty that it was in reverse gear (R. Vol. II, pp. 11, 153, 154, 157, 158, 160). The act of Vaughn in starting the motor and putting the truck in reverse gear was the proximate cause of the injuries sustained and a cause for which neither the owner nor the operator of the barge was in any degree responsible. There is, therefore, no basis on which to predicate a finding of negligence on the part of petitioner. Hendricks v. Pyramid Motor Freight Corp., 195 A. 907, 909.

If this act of the decedent was the proximate cause of the accident, it is entirely immaterial whether defects in the equipment, such as lack of chains or scotches, existed as found by the trial court, since liability may not be predicated on defects that were not the proximate cause of the death of Vaughn and his children. Biggert v. Memphis Power & Light Co., 168 Tenn. 638, 80 S. W. 2d 90.

4. The damages for the death of Vaughn were assessed without any substantial evidence of his earning capacity or adequate data on which to compute the pecuniary value of his life to his beneficiaries under the statute. A verdict may not rest upon conjecture (Buckeye Cotton Oil Co. v. Campagna, 146 Tenn. 389, 242 S. W. 246), and there must be some data other than speculation from which damages may be ascertained. Dayton Veneer & L. Mills v. Cincinnati N. O. & T. P. Ry. Co., 132 F. 2d 222, 223; Washington Sand & Gravel Co. v. Brann & Stuart Co., 162 F. 2d 826, 829; 25 C. J. S., p. 496.

In the effort to supply such data, respondent, at the trial, was permitted to testify as to the gross proceeds of the crop produced by Vaughn and those working with him during the year 1947, and to do so without showing the amount paid for labor and other expenses incident to producing the crop (R. Vol. I, pp. 56, 72, 73). Petitioner

moved the exclusion of this evidence. The motion was overruled by the Court (R. Vol. I, pp. 56, 67). Such action of the court was plain error. Railway Co. v. Howard, 90 Tenn. 144, 151, 19 S. W. 116.

Regardless of the error in its admission, this evidence was intrinsically destitute of probative quality as to the pecuniary value of the life of Vaughn or even of his earning capacity in the year for which it was offered. There was no other evidence offered to show or which tended to show his earning capacity or the pecuniary value of his life.

It is not insisted that the pecuniary value of Vaughn's life or the compensation to which the beneficiaries under the statute are entitled should be established with mathematical certainty but there must be some material evidence to establish that value. The controlling principle is thus stated in 25 C. J. S., p. 496:

> "However, where actual pecuniary damages are sought, there must be evidence of their existence and extent, and some data from which they may be computed. No substantial recovery may be based on mere guesswork or inference; without evidence of facts, circumstances, and data justifying an inference that the damages awarded are just and reasonable compensation for the injury suffered, and when compensatory damages are susceptible of proof with approximate accuracy and may be measured with some degree of certainty, they must be so proved even in actions of tort."

5. This application for a writ of certiorari involves something more than the review of a concurrent finding of facts by the Trial Judge and the Court of Appeals. Ordinarily this Court does not, in admiralty more than in other cases, review the concurrent findings of fact of the two

courts below,[2] but the rule does not apply where clear error is shown.[3]

So far as we have been able to discover, this Court has not determined whether the Court of Appeals in reviewing the findings of the Trial Court in admiralty cases applies what may be aptly designated as the "material evidence rule" as distinguished from the "preponderance of evidence rule". Or, otherwise stated, shall the Court of Appeals affirm if there is any substantial evidence to support the findings of the Trial Judge although such findings may be against the clear weight of the evidence? Except as hereinafter stated, the failure of the Court of Appeals to review the facts or pass upon specific issues requires an examination of the record to determine the basis of affirmance.

The exceptions are:

(1) The inconsistency between the seventh finding of fact, reciting that Vaughn was not guilty of "negligence of any kind or character" (R. Vol. I, p. 27) and the fifth and sixth findings, showing that he was in a position to observe the defects found to make the barge unseaworthy (R. Vol. I, pp. 26, 27).

(2) The inconsistency between the recital in the fifth conclusion that it was proper to make an allowance to the mother of the deceased minors for the deprivation of their society and companionship and the subsequent elimination of this conclusion without any reduction in damages (R. Vol. I, pp. 29, 32, 33).

If admiralty cases are to be tried de novo in the appellate court with a presumption in favor of the findings of fact by the trial court, it seems to us to be a question of

[2] Mahnich v. Southern Steamship Co., 321 U. S. 96.

[3] Texas and New Orleans Ry. Co. v. Brotherhood of Railway and Steamship Clerks, 281 U. S. 548, 558.

general importance whether the Court of Appeals should reverse on the facts where the evidence clearly preponderates against the verdict or affirm if the verdict is supported by any substantial evidence.

The importance of the distinction between the two rules is illustrated by the finding of the trial court that the decedent, Charlie W. Vaughn, was standing beside the truck when it started its backward movement (R. Vol. I, p. 26). Mrs. Vaughn so testified but the other witnesses for respondent (R. Vol. I, pp. 103, 104, 210) testified that Vaughn did not get out of the truck after it went onto the barge, and witnesses for petitioner testified to the same effect (R. Vol. II, pp. 12, 98, 115, 128). The testimony of Mrs. Vaughn was some evidence on this point but contrary to the overwhelming weight of the testimony.

Moreover, an examination of the entire record will further show that the only evidence offered to prove the earning capacity of Vaughn was that with respect to the gross proceeds of a crop produced by him and others during the year 1947 and not only lacking in substantial probative quality but clearly incompetent (Ry. Co. v. Howard, supra). To be classed as substantial, evidence must at least be competent. Mississippi Valley Insurance Co. v. Begley, 310 Mo. 287, 275 S. W. 540.

So we have a situation not only where the finding of liability was predicated on conclusions in conflict with scientific principles and physical facts established by undisputed evidence, but also where a substantial amount of damages, $17,500.00, was awarded for the death of the decedent, Charlie W. Vaughn, without a scintilla of evidence showing, or tending to show, the pecuniary value of his life to his beneficiaries under the applicable Tennessee statute, which makes such value the measure of damages in an action for death.

PRAYER.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals for the Sixth Judicial Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and proceedings in the case entitled on its docket No. 11,023, E. R. Moody, Appellant, v. Leonard Edmonston, Administrator of the Estate of Norris H. Vaughn, et al., Appellees, to the end that said case may be reviewed and determined by this Court as provided by the judicial code (U. S. C. A. Title 28, Sec. 2101), and that the judgment of the Court of Appeals for the Sixth Circuit be reversed by this Honorable Court, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem right and proper.

VON MAYES,
L. E. GWINN,
Counsel for Petitioner, E. R. Moody.

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Respondent.

No. 793

ANSWER OF RESPONDENT TO PETITION FOR CERTIORARI

Hillsman Taylor
Memphis, Tenn.
Jones Greer
Dyersburg, Tenn.
Robert E. Joyner
Memphis, Tenn.
Sam Costen
Counsel for Respondent

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ANSWER OF RESPONDENT TO

PETITION FOR CERTIORARI

TO THE HONORABLES THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I.

The petition presents no matter of law or fact that was not exhaustively considered and extensively determined by the District Court, with the concurrence of the Circuit Court of Appeals. (R. V. I, pp. 24-28; R. V. II, pp. 219, 229).

II.

The questions presented by the petition are questions of fact (Petition pp. 7-8), that of contributory negligence constituting the bulk of the petition. Moreover, the District Court and the Circuit Court of Appeals, affirming and denying petition to rehear, have made concurrent findings that there was no contributory negligence on the part of any of the deceased persons. Both courts have held that the ferry was unseaworthy and that petitioner had knowledge of this unseaworthiness. (R. V. I, pp. 24-28; R. V. II, pp. 219, 229).

III.

The discretion of this Court to grant the Writ of Certiorari is rarely motivated by a prayer for mere review of evidence or discussion of facts, where both Courts below have concurred.

UNITED STATES vs. Johnston,

45 S. Ct. 496,
268 U. S. 220,
69 L. Ed. 925.

This rule applies with added force in admiralty cases.

MANHICK vs. SOUTHERN S.S. CO.,

64 S. Ct. 455,
321 U. S. 96,
88 L. Ed. 561.

WHEREFORE, respondent prays that the Petition for Certiorari be denied.

Respectfully submitted,
Hillsman Taylor, Memphis, Tenn.
Jones Greer, Dyersburg, Tenn.
Robert E. Joyner, Memphis, Tenn.

Counsel for Respondent